

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

EMPOWER OVERSIGHT
WHISTLEBLOWERS & RESEARCH,

Plaintiff,

v.

NATIONAL INSTITUTES OF HEALTH,

Defendant.

Case No. 1:21-cv-1275 (LMB/JFA)

SECOND SUPPLEMENTAL DECLARATION OF GORKA GARCIA-MALENE

I, Gorka Garcia-Malene, declare as follows:

1. I am the Freedom of Information Act (“FOIA”) Officer, National Institutes of Health (“NIH”), U.S. Department of Health and Human Services (“HHS” or the “Department”).

I have held this position with NIH since October 15, 2017.

2. My duties include responding to requests for NIH records under FOIA, 5 U.S.C. § 552. These duties include managing searches for NIH records in response to FOIA requests, providing guidance to NIH record custodians or personnel regarding these searches, and determining whether to release or withhold records or portions of records in accordance with FOIA and HHS regulations implementing FOIA.

3. I make this Supplemental Declaration based upon my personal knowledge and information available to me in my official capacity to supplement my Declarations dated March 30, 2022, and June 10, 2022. I have reviewed all documents at issue in the above-captioned litigation.

4. The purpose of this declaration is to comply with the Court’s August 12, 2022,

Order (Dkt. 56). Familiarity with the underlying FOIA requests is presumed.

I. NIH'S Organizational Structure

5. NIH is the nation's medical research agency, seeking to make discoveries that improve health and save lives. *See* Gorka Garcia-Malene Suppl. Decl. (June 10, 2022) (Dkt. 37-2) ¶ 5.

6. NIH's Office of the Director ("OD") is the "central office" of the agency. *NIH, The NIH Almanac: Office of the Director*, <https://www.nih.gov/about-nih/what-we-do/nih-almanac/office-director-nih>, (last updated Apr. 13, 2022). NIH's OD "is responsible for setting policy for NIH and for planning, managing, and coordinating the programs and activities of all 27 of NIH's Institutes and Centers." Exhibit I (NIH, *The NIH Almanac: NIH Organization*, <https://www.nih.gov/about-nih/what-we-do/nih-almanac/nih-organization> (last updated June 14, 2018)).

7. NIH's 27 Institutes and Centers are as follows:

- a. National Cancer Institute (NCI)
- b. National Eye Institute (NEI)
- c. National Heart, Lung, and Blood Institute (NHLBI)
- d. National Human Genome Research Institute (NHGRI)
- e. National Institute on Aging (NIA)
- f. National Institute on Alcohol Abuse and Alcoholism (NIAAA)
- g. National Institute of Allergy and Infectious Diseases (NIAID)
- h. National Institute of Arthritis and Musculoskeletal and Skin Diseases (NIAMS)

- i. National Institute of Biomedical Imaging and Bioengineering (NIBIB)
- j. Eunice Kennedy Shriver National Institute of Child Health and Human Development (NICHD)
- k. National Institute on Deafness and Other Communication Disorders (NIDCD)
- l. National Institute of Dental and Craniofacial Research (NIDCR)
- m. National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK)
- n. National Institute on Drug Abuse (NIDA)
- o. National Institute of Environmental Health Sciences (NIEHS)
- p. National Institute of General Medical Sciences (NIGMS)
- q. National Institute of Mental Health (NIMH)
- r. National Institute on Minority Health and Health Disparities (NIMHD)
- s. National Institute of Neurological Disorders and Stroke (NINDS)
- t. National Institute of Nursing Research (NINR)
- u. National Library of Medicine (NLM)
- v. Center for Information Technology (CIT)
- w. Center for Scientific Review (CSR)
- x. Fogarty International Center (FIC)
- y. National Center for Advancing Translational Sciences (NCATS)
- z. National Center for Complementary and Integrative Health (NCCIH)
- aa. NIH Clinical Center (CC)

Exhibit I.

II. NIH's Office of the Director ("OD") Organizational Structure

8. The OD contains several major offices. Relevant here, the Office of Communication and Public Liaison ("OCPL") and the Office of Legislative and Policy Analysis ("OLPA") are two of the major offices within the OD. *NIH, The NIH Almanac: Office of the Director*, <https://www.nih.gov/about-nih/what-we-do/nih-almanac/office-director-nih>, (last updated Apr. 13, 2022). The organizational structure of OD is reflected in an organizational chart, attached as Exhibit J to this Declaration.

- a. OCPL "advises the Director and is responsible for communicating information on NIH policies, programs, and research results to the general public, the media, public interest groups, the scientific and medical communities, and other audiences." *NIH, The NIH Almanac: Office of the Director*, <https://www.nih.gov/about-nih/what-we-do/nih-almanac/office-director-nih>, (last updated April 13, 2022). Within OCPL, there are three offices: the Public Information Office, the Public Affairs Office, and the FOIA Office. Exhibit K.
- b. OLPA "serves as the principal legislative policy, analysis, and development office for the Director and other senior NIH staff; develops legislative policy and proposals; and provides analysis and liaison with Congress, the U.S. Department of Health and Human Services, and other Federal agencies on issues affecting NIH programs and activities." *NIH, The NIH Almanac: Office of the Director*, <https://www.nih.gov/about-nih/what-we-do/nih-almanac/office-director-nih>, (last updated April 13,

2022).

9. The Executive Secretariat provides direct support to the OD. In relevant part, the Executive Secretariat manages the correspondence of the Immediate Office of the Director. The Immediate Office of the Director is the Director, NIH, the Deputy Director, NIH, the Associate Deputy Director, NIH, and the schedulers and assistants working directly with these three officials.

10. The Executive Secretariat uses a database called “Synthesize, Analyze, Adjudicate, and Vet Information (“SAAVI”) to manage the Immediate Office of the Director’s correspondence. *See also* Garcia-Malene Suppl. Decl. ¶¶ 40, 41.

A. Searches Within the OD

11. NIH searched OCPL, OLPA, and the Executive Secretariat, all within the OD, in response to Plaintiff’s FOIA requests.

12. In response to Item 2 of Plaintiff’s FOIA Request 56712, NIH searched the email accounts of Dr. Frances Collins, Dr. Lawrence Tabak, Dr. Michael Lauer and John Burklow. Garcia-Malene Suppl. Decl. ¶ 19.

13. This search was done during the course of this litigation, after the parties’ counsel conferred to narrow the scope of Item 2, which sought “*all communications* regarding the request to withdraw the SARS-CoV-2 sequences from Sequence Read Archive in June 2020” for the time period June 1, 2020 to June 30, 2020. *See* Garcia-Malene Suppl. Decl. ¶¶ 10, 19 (emphasis added).¹

14. The first additional search of these four custodians used the keywords: “Jesse Bloom” and “*Recovery of deleted deep sequencing data sheds more light on the early Wuhan*

¹ NIH’s first search for records responsive to Item 2 of Request 56712 is found at ¶ 28, *infra*.

SARS-CoV2 epidemic.” The second additional search used the keyword:

“jbloom@fredhutch.org.” See Garcia-Malene Suppl. Decl. ¶ 19.

15. Responsive records from the two searches of the four custodians requested by Plaintiff were produced in NIH’s second production of documents on May 13, 2022. See Garcia-Malene Suppl. Decl. ¶ 19.

16. In response to Item 4 of Plaintiff’s FOIA Request 56712, OCPL searched OCPL’s leadership for emails responsive to the request. The OCPL was the only place searched for Item 4 because Plaintiff specifically designated the NIH Press Office as the search location in Plaintiff’s FOIA Request 56712, and OCPL serves as the agency’s “Press Office.” NIH therefore believes that due to this careful and strategic tailoring by Plaintiff itself, this search location was sufficient and reasonably calculated to identify the records sought in Item 4. See Garcia-Malene Suppl. Decl. ¶ 20.

17. To conduct its search in response to Item 4 of Plaintiff’s FOIA Request 56712, the OCPL used the keywords “NIH statement sequence read archive” for the dates requested. These keywords were used because Plaintiff’s FOIA Request 56712 specifically mentioned communications regarding the NIH statement on Sequence Read Archive. The following custodians conducted the search: Amanda Fine (Acting Deputy Director of OCPL), Renate Myles (Acting Director of OCPL), and John Burklow (Director of OCPL). These individuals constitute the portion of OCPL’s leadership that would have been involved in any high-profile or sensitive communications about the SRA. See Garcia-Malene Suppl. Decl. ¶ 21.

18. Responsive documents from OCPL’s search were included in NIH’s first production of documents on February 7, 2022. Garcia-Malene Decl. (Mar. 30, 2022) (Dkt. 37-1) ¶ 19.

19. The OD's Executive Secretariat searched the SAAVI database for records responsive to Plaintiff's FOIA Request 57203. The SAAVI database of the NIH Director's Executive Secretariat was searched because it is the system of record for all NIH Director and Principal Deputy Directors records, and it houses the email accounts of the Immediate Office of the Director, where records related to Congressional requests would be found. *See* Garcia-Malene Suppl. Decl. ¶ 41; *see also id.* ¶ 40 (explaining the normal processing of Congressional correspondence).

20. The Executive Secretariat searched the SAAVI database and used the keywords "Grassley," or "Blackburn," or both. These keywords were used because they were specifically mentioned in Plaintiff's FOIA Request 57203. *See* Garcia-Malene Suppl. Decl. ¶ 42.

21. Responsive documents from the Executive Secretariat's SAAVI database search were included with NIH's first production of documents on February 7, 2022. *See* Garcia-Malene Decl. (Dkt. 37-1) ¶ 31.

22. NIH did not separately search any individual email accounts in the NIH Director's Executive Secretariat for documents responsive to FOIA Request 57203 given that Drs. Collins and Tabak's email accounts are already captured by the SAAVI database. *See* Garcia-Malene Suppl. Decl. ¶ 43.

23. In addition to SAAVI, NIH searched for responsive records to Plaintiff's FOIA Request 57203 in OD's OLPA because the NIH Director's Executive Secretariat works closely with OLPA to ensure that all Congressional correspondence is appropriately handled and vetted. *See* Garcia-Malene Suppl. Decl. ¶ 44.

24. Responsive documents from OLPA's search were produced in NIH's second production of documents on May 13, 2022. *See* Garcia-Malene Suppl. Decl. ¶ 44.

III. NIH's National Library of Medicine Organizational Structure

25. The National Library of Medicine ("NLM") is one of NIH's 27 components. *Supra*, ¶¶ 5, 6. NLM is "the world's largest biomedical library." *About the NLM*, <https://www.nlm.nih.gov/about/index.html> (last accessed Aug. 14, 2022). NLM "maintains and makes available a vast print collection and produces electronic information resources on a wide range of topics that are searched billions of times each year by millions of people around the globe." *Id.* Additionally, NLM "also supports and conducts research, development, and training in biomedical informatics and health information technology." *Id.* The organizational structure of NLM is reflected in an organization chart, attached as Exhibit L to this declaration.

26. One of the NLM's centers is the National Center for Biotechnology Information ("NCBI"). *See* Exhibit M (*NLM by Organization*, <https://www.nlm.nih.gov/about/org.html> (last accessed Aug. 15, 2022)). NCBI "advances science and health by providing access to biomedical and genomic information." *Welcome to NCBI*, <https://www.ncbi.nlm.nih.gov/> (last accessed Aug. 15, 2022).

27. NCBI hosts a variety of databases. Exhibit N (*All Resources*, <https://www.ncbi.nlm.nih.gov/guide/all/> (last accessed Aug. 15, 2022)). Relevant here, one of the databases it hosts is the Sequence Read Archive ("SRA."). *Id.*

A. Searches at NCBI

28. NCBI uses a database for tracking communications between curators and submitters to NCBI databases (including SRA). In response to Items 1 and 2 of Plaintiff's FOIA Request 56712, NCBI searched that database for communications between SRA curators and the submitter of the withdrawn SARS-CoV2 sequences at Wuhan University. That database was selected as a location to search because it houses the records Plaintiff is seeking, i.e., anything

related to SRA curators, Sequence Read Archive, or all submitted sequences. As applied here specifically, the submitter involved in Plaintiff's FOIA Request 56712 had provided the withdrawn sequences under the project ID "PRJNA612766." As a result, the NCBI team used that project ID "PRJNA612766" as the keyword to pull responsive documents from the database for the dates requested. *See Garcia-Malene Suppl. Decl. ¶ 16.*

29. Responsive records from the SRA communications-tracking database were produced on February 7, 2022 in NIH's first production of documents. *See Garcia-Malene Decl. (Dkt. 37-1) ¶ 16.*

30. In response to Item 3 of Plaintiff's FOIA Request 56712, NIH conducted different searches. NIH asked Stephen Sherry, Acting Director of NCBI, to search his Outlook account for responsive emails. As Acting Director for the program overseeing the SRA, Dr. Sherry's email would have been involved in all communications sought by Plaintiff, i.e., communications related to sequences, namely, withdrawn sequences, sequencing data related to the Wuhan SARS-CoV-2 epidemic, and Jesse Bloom. NIH therefore believes that due to the overseeing role of Dr. Sherry, this search was sufficient and reasonably calculated to identify the records sought in Item 3 at NCBI. *See Garcia-Malene Suppl. Decl. ¶ 17.*

31. To conduct his search, Dr. Sherry used the following keywords: "preprint," "jesse bloom" or "biorxiv" for the dates requested. The reason why Dr. Sherry used these keywords was that on June 22, 2021, Jesse Bloom, Ph.D., of Fred Hutchinson Cancer Research Center, who is the individual mentioned in Plaintiff's FOIA Request 56712, published a manuscript on bioRxiv, "the server for biology preprints." Dr. Bloom also published an article, *Recovery of Deleted Deep Sequencing Data Sheds More Light on the Early Wuhan SARS-Cov2 Epidemic* (available: <https://www.biorxiv.org/content/10.1101/2021.06.18.449051v1>), which

identifies several early obtained SARS-CoV2 sequences that he recovered from Google Cloud after they were “deleted from the NIH’s Sequence Read Archive.” Both the manuscript and article related to the topics of “biorxiv,” “jesse bloom,” and “preprint” and hence, represented the keywords used in the search. *See* Garcia-Malene Suppl. Decl. ¶ 18.

32. Responsive records from Dr. Sherry’s email search were included in NIH’s first production on February 7, 2022. *See* Garcia-Malene Decl. (Dkt. 37-1) ¶¶ 17-18.

IV. Conclusion

33. NIH searched certain offices within the OD, NIH’s central office, for records responsive to Requests 56712 and 57203. Plaintiff’s FOIA requests sought records relating to Congressional correspondence and media outreach related to the submission, and later withdrawal in June 2020, of sequences to the SRA. NIH searched OCPL, OLPA, and Executive Secretariat because these offices handle communications strategy, Congressional outreach, and records retention in the Immediate Office of OD, respectively, and were most likely to have records responsive to Plaintiff’s FOIA Requests 56712 and 57203.

34. NIH also searched parts of NCBI, which is part of NLM, for records responsive to Plaintiff’s FOIA Request 56712. Plaintiff’s FOIA Request 56712 sought information about the specific sequence submission to the SRA and the later withdrawal. SRA is a database housed within NCBI. NIH searched the SRA’s communication-tracking database and the email of Dr. Sherry, Acting Director of NCBI, as those were the most likely locations of records responsive to Request 56712.

35. NIH did not search other centers within NIH because those other centers were not likely to have records responsive to Plaintiff’s FOIA Requests 56712 and 57203.

36. Plaintiff has not identified to my office any other Institute or Center within NIH

that could reasonably be considered within the scope of Plaintiff's FOIA request, nor has Plaintiff requested that any other location within NIH be searched for responsive records.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury the foregoing to be true and correct, to the best of my knowledge, information and belief.

Executed this 15th day of August, 2022.

Gorka
Garcia-
malene -S

Digitally signed by
Gorka Garcia-malene
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